No. 82-342

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 11, 1982
CERTIORARI GRANTED OCTOBER 18, 1982

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v.

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UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

GENERAL DOCKET

79-1565

Date	Filings—Proceedings
(D)6-1-79	4—Petitioner's petition for review of an order of the EPA
(D)6-1-79	Certified copy of petition for review was mailed to EPA
(T)6-29-79	4—Motion of Alabama Power Company, et al. for leave to intervene (m-29)
(T)6-29-79	4—Motion of National Coal Association for leave to intervene (m-29)
(E)7-10-79	Clerk's order granting the motions of Alabama Power Co., et al. and National Coal Association for leave to intervene. Intervenor's briefs are extended until 15 days after the party they support files its brief.
(G)7-16-79	Certified Index to Record (n-5)
(E)8-17-79	Clerk's order that this case is consolidated with 79-1719 and the motion to establish a briefing schedule is denied without prejudice to resubmission at such time as the time for filing of petitions for review of the order under review expires
(C)8-17-79	4—Respondent's motion to consolidate Nos. 79-1565, 79-1719, 79-1867, 79-1874; to adopt the certified index in 79-1565 as the index in 79-1719, 79-1867, 79-1874; and to stay further proceedings pending completition [*sic*] of administrative action (m-17)
(E)9-10-79	Clerk's order granting respondent's motion to consolidate Nos. 79-1565, 79-1719, 79-1867 and 79-1874 and the certified index filed in 79-1565 shall be deemed filed in the consolidated cases. Petitioners' briefs is extended until 40 days after respondent's disposition of the pending petitions for reconsideration of the rule at issue. Counsel for respondent shall advise the Clerk of the status of the petition at 60 day intervals hereafter

Date	Filings—Proceedings
(T)10-11-79	Clerk's order granting intervention in Nos. 79-1867 and 79-1874
(D)10-26-79	4—Motion of Sierra Club/EDF for order compelling EPA to convene proceedings for reconsideration (m-26)
(D)11-5-79	4—Respondent's opposition to Sierra Club/EDF for order compelling EPA to convene proceedings for reconsideration (m-5)
(C)11-19-79	4—EPA's status report per 9/10/79 order (m-9)
(T)11-29-79	4—Petitioner's motion for leave to file out of time reply to EPA's opposition to motion for order compelling EPA to convene proceedings for reconsideration (m-29)
(C)12-4-79	Clerk's order granting petitioner's (environmental) motion for leave to file reply to EPA's opposition to motion for order compelling and Clerk is directed to file petitioner's lodged reply
(C)12-4-79	4—Petitioner's (environmental) reply to respondent's opposition to motion for order compelling EPA to convene proceedings for reconsideration (m-29)
(E)12-7-79	Per Curiam order denying the motion for an order compelling the EPA to convene proceedings for reconsideration and, sua sponte, that respondent dispose of the pending petitions for reconsideration on or before Jan. 31st. and that the order filed Sept. 10th, 1979 is modified to the extent that a status report be filed Dec. 19th, 1979 and further reports at 20 days intervals; McGowan (who did not participate), Tamm and Wald, CJ's
(D)12-18-79	4—Respondent's status report (m-18)
(D)1-7-80	4—Respondent's status report (m-4)
(D)1-25-80	4—Respondent's status report (m-24)
(D)2-11-80	4—Respondent's status report
(T)2-14-80	4—Petitioner's motion to establish expedited briefing schedule (m-14)
(D)2-22-80	4—Respondent's response to petitioner's motion to establish expedited briefing
(D)2-25-80	4—Petitioner's (State of CA. Air Resources Board in 79-1867) opposition to petitioner's motion to establish expedited briefing schedule (m-22)
(E)2-29-80	Clerk's order granting petitioner's motion to consolidate Nos. 80-1187, 80-1201 & 80-1213 with 79-1565, et al.

Date	Filings—Proceedings
(C)2-29-80	4—Petitioners' motion to extend time to file reply to responses to motion to establish briefing schedule (m-29)
(T)3-7-80	Clerk's order granting petitioners' motion to extend time to file reply to response to motion to establish briefing schedule to March 3, 1980
(T)3-7-80	4—Petitioners' reply to oppositions to motion to establish expedited briefing schedule (m-3)
(D)3-7-80	4—Respondent's motion for leave to file reply to response on briefing schedule (m-7)
(E)4-1-80	Clerk's order, sua sponte, that Nos. 79-1565, et al. and 80-1338 are consolidated
(E)4-1-80	Per Curiam order granting the motion to expedite and the following schedule shall apply May 21st—petitioners' briefs, June 23rd—respondent's brief, July 9th—intervenor's briefs, July 23rd—reply briefs. Intervenor's briefs should not repeat argument set forth by respondents. The parties are granted leave to proceed under Rule 30(c). The cases will be heard at oral argument during the September, 1980 sitting period of the Court; CJ Wright, Tamm (who did not participate) and Robinson, CJ's
(C)4-10-80	4—Respondents' motion for leave to file supplemental certified index (m-7)
(E)4-18-80	Clerk's order granting respondent's motion to file supplemental certified index
(E)4-18-80	Supplemental Certified Index (n-10)
(D)5-8-80	4—EPA's motion for leave to file supplemental certified index to record (m-8)
(E)5-16-80	Clerk's order granting respondent's motion for leave to file supplemental certified
(E)5-16-80	Supplemental Certified Index to Record (n)
(E)5-16-80	Order per CJ Wright that in the event of a denial of the motion for leave to take depositions or serve interrogatories the following briefing schedule shall apply: petitioners briefs—10 days after denial of motion, respondent's brief—33 days after petitioners briefs, Intervenors' briefs—16 days after respondent's brief, reply briefs—14 days after intervenors' briefs. If the motions are granted, new motions to govern the briefing should be submitted within 10 days of the order granting the motion.
(C)6-3-80	Order per CJ Wright denying EDF's motion for clarification of order of 5/16/80

Date	Filings—Proceedings
(D)6-3-80	4—Respondent's motion for leave to file supplemental certified index to record (m-3)
(C)6-9-80	Clerk's order granting respondent's motion for leave to file supplemental certified index
(C)6-9-80	Supplemental Certified Index to Record (n)
(C)6-16-80	Per Curiam order that the documents listed in EDF's motion to supplement the record lodged with the Court pending determination whether they should be included in the record; Copies of the documents shall be included in a separate volume of the joint appendix and cited in the briefs as Appendix to Lodged Documents (ALD); The parties in their briefs should address the question of the relevance of the documents and also the issues raised by them; McGowan (who did not participate); Mikva and Edwards, CJs
(C)6-16-80	Per Curiam order that petitioner's (EDF) motion for leave to obtain discovery is referred to the division of this Court to be drawn to hear this case on the merits; The parties in their briefs should address the petitioner's entitlement to the information requested and petitioner's need for the information requested in order to prosecute its case fully; respondent shall submit to the court within 5 days of the date of this order an affidavit(s) providing information about the following meetings, identified here by date with reference to the petitioner's motion: March 14, 1979; April 23, 1979; April 27, 1979; April 30, 1979; May 2, 1979; The affidavit shall identify the participants in the foregoing meetings, and shall describe as fully and accurately as possible how the meetings came to be held and the approximate length of each; Briefs in these cases shall be submitted pursuant to the following schedule: Petitioners' brief(s)—10 days after filing of respondent's affidavit Respondent's brief—30 days after filing of petitioners' brief Intervenors' brief(s)—15 days after filing of respondent's brief Reply brief(s)—12 days after filing of intervenors' brief(s) McGowan (who did not participate); Mikva & Edwards, CJs

Date	Filings—Proceedings
(D)6-20-80	4—Respondent's motion to extend time to file affidavits to 6-24-80 (m-20)
(D)6-23-80	4—Petitioner's motion to extend time to file brief and for leave to file brief exceeding page limitations (m-20)
(E)6-25-80	Clerk's order granting respondent's motion to extend time to file affidavits to June 24, 1980
(D)6-25-80	1—Affidavits pursuant to order of 6-16-80
(C)6-27-80	Clerk's order granting petitioner's motion for leave to file brief not in excess of 65 pages by standard typographical print or 85 pages by any other method and the briefing schedule set forth in this Court's order of 6/16/80 is amended so that the following schedule shall now apply: July 11, 1980—Petitioner's brief; August 11, 1980—Respondent's brief; August 26, 1980—Intervenors' brief(s); September 8, 1980—Reply briefs, if any; No further extensions of time for filing briefs shall be allowed
(G)7-14-80	15—Petitioner's brief (m-9)
(D)7-23-80	4—Respondents' motion to extend time to file brief to 9-2-80 (m-23)
(T)7-28-80	4—Petitioner's response to respondents' motion to extend time to file brief (m-24)
(C)08-04-80	Clerk's order granting respondents' motion to extend time to file brief to 9/2/80; No further extension of time will be granted except for extraordinary cause shown
(T)08-04-80	4—Respondents' motion for leave to file motion to exceed page limitations on brief (m-4)
(B)08-14-80	Clerk's order directing that Clerk to file respondents' motion for leave to exceed page limitation in brief and respondent is granted leave to file a brief not in excess of 150 pages
(B)08-14-80	4—Respondent's motion for leave to exceed page limitation on brief (m-4)—filed per above order
(B)08-14-80	Clerk's order, sua sponte, that this Court's order of 8-4-80 be, and the same here by is, vacated and that the following briefing schedule, with no further extensions, shall apply: Respondent's brief—9-2-80; Intervenor's brief(s)—9-17-80; Reply briefs—9-30-80
(C)08-25-80	4—Respondents' motion for leave to file affidavit (m-21)

Date	Filings—Proceedings
(C)09-02-80	4—Respondents' motion for leave to file motion to file brief exceeding page limitations (m-2)
(B)09-05-80	Clerk's order granting respondents' motion for leave to file affidavit
(B)09-05-80	4—Respondents' affidavit (m-21)
(T)09-09-80	Clerk's order, sua sponte, that the following times are allotted for oral argument: Appalachian Power Co., et al—20 minutes; Sierra Club and EDF—30 minutes (2 counsel may argue); EPA (and supporting intervenor National Coal Association)—45 minutes (2 counsel may argue); TOTAL TIME—1 hour 35 minutes
(T)09-09-80	Clerk's order directing Clerk to file respondents' second motion for leave to extend page limitations and granting motion
(T)09-09-80	4—Respondents' second motion for leave to extend page limitations—granted
(T)09-09-80	15—Respondents' brief (m-2)
(T)09-10-80	4—Letter from counsel for respondents advising of additional authorities pursuant to Rule 28(j), FRAP (m-8)
(T)09-12-80	Clerk's order, sua sponte, that this Court's order of September 9, 1980 is amended by deleting therefrom the instruction that two counsel may argue on behalf of the Environmental Protection Agency and supporting intervenor National Coal Association; leave is granted for two counsel to argue on behalf of the Environmental Protection Agency and one counsel on behalf of the National Coal Association.
(T)09-12-80	7—EDF's appendix of lodged documents—lodged per order dated 6/16/80 (m-12)
(T)09-17-80	15—Intervenor's (National Coal Association) brief (m-17)
(C)09-18-80	7—Joint appendix (Vol. I) (m-17)
(B)09-22-80	Argued before Robb, Wald* and Ginsburg, CJ's
(T)09-23-80	4—Response of Appalachian Power Co., et al. to motion of Environmental Defense Fund for extension of briefing schedule (m-23)
(B)09-25-80	Per Curiam order that petitioner is granted leave to file a reply brief not in excess of 40 pages of standard typographic printing or 50 pages by any other process; and that the motion for enlargement of time to file reply brief is denied; Robb, Wald, and Ginsburg, CJ's (in Nos. 79-1874 and 80-1213 only)

Date	Filings—Proceedings
(T)09-25-80	4—Petitioner's motion to extend time to file reply brief to October 14, 1980 (m-24)
(T)09-25-80	Letter from Clerk to counsel requesting that certain material be submitted
(B)10-06-80	Clerk's order denying the motion of Sierra Club, et al. to extend time to file reply brief to
(T)10-08-80	7—Joint Appendix (Volumes II through XI) (m-8)
(T)10-09-80	15—Petitioner's reply brief (m-30)
(T)10-14-80	7—Corrected joint appendix volume XI (m-14)
(T)10-21-80	15—Respondents' brief (m-21)
(C)10-22-80	7—Joint Appendix (Vol XII) (m-22)
(C)10-24-80	15—Intervenor's (National Coal Assoc.) brief (m-24)
(C)11-05-80	15—Petitioner's brief (m-31)
(C)11-05-80	15—Petitioner's reply brief (m-31)
(T)01-16-81	4—Letter from counsel for respondents supplementing their 28(j) letter of September 10, 1980 (m-15)
(T)01-22-81	Per Curiam order that EPA shall submit to the Court a brief memorandum within 10 days from the issuance of this order which responds to petitioners' argument about the Bruce Mansfield data; petitioners Appalachian Power Co., et al., are granted leave to reply with a brief memorandum within 5 days thereafter; Robb, Wald and Ginsburg, CJs
(T)01-26-81	4—Letter from counsel for EDF advising of additional authorities pursuant to Rule 28(j), FRAP (m-23)
(T)02-03-81	4—EPA's supplemental memorandum (m-3) (OK RB)
(C)02-17-81	4—Response of Appalachian Power Co., et al. to EPA's supplemental memorandum (m-14)
(H)4-29-81	Opinion for the Court filed by Circuit Judge Wald
(H)4-29-81	Judgment affirming the regulations of the EPA, for the reasons set forth in the Opinion for the Court filed herein this date.
(T)05-13-81	4—Petitioner's motion for an award of attorneys fees (m-12)
(T)05-21-81	4—Respondent's motion to extend time to file response to motion for an award of attorneys fees to June 5, 1981 (m-21)
(V)05-26-81	4—EDF's motion for an award of attorneys fees (m-26)
(B)05-29-81	Clerk's order granting respondent's motion [*sic*] to extend time to file response to motion for an award of attorneys fees to June 5, 1981

Date	Filings—Proceedings
(R)06-01-81	Per Curiam order sua sponte, that the Opinion for the Court filed by Circuit Judge Wald in this case on April 29, 1981 is hereby amended (See Order)
(V)06-05-81	4—Respondent's unopposed motion to extend time to answer motions of Sierra Club and EDF for attorneys fees to July 3, 1981 (m-4)
(B)06-18-81	Clerk's order granting respondent's motion to extend time to answer motions of Sierra Club and EDF for attorneys fees to July 3, 1981
(V)07-06-81	4—EPA's unopposed motion to extend time to answer motions of Sierra Club and EDF for attorneys fees to July 21, 1981 (m-6)
(B)07-09-81	Clerk's order that EPA's motion to extend time to answer motions of Sierra Club and EDF for attorneys fees to July 21, 1981 is granted
(V)07-21-81	4—EPA's motion to extend time to respond to Sierra Club's and EDF's motions for attorneys fees to August 20, 1981 (m-21)
(B)08-03-81	Clerk's order granting EPA's motion to extend time to respond to Sierra Club's and EDF's motions for attorneys fees to August 20, 1981
(V)08-26-81	4—Respondent's motion for leave to file response to Sierra Club's and EDF's motion for awards of attorneys fees, out of time (m-26)
(V)09-16-81	4—Petitioner's opposition to respondent's motion for leave to file response to Sierra Club's and EDF's motion for award of attorneys fees, out of time (m-11)
(V)09-22-81	4—Petitioner's (EDF) motion for leave to respond to respondent's motions to file out of time and for enlargement of time to respond to motions for award of attorneys' fees, out of time (m-22)
(B)10-05-81	Per Curiam order, sua sponte, that the Sierra Club is granted leave to amend its petition for attorneys fees and to file said amended petition on or before 10-13-81; and sua sponte, that parties herein are granted an extension of time to and including 10-20-81, within which to file a response to the amended petition for attorneys' fees; Robb, Wald, and Ginsburg, CJ's vacated per 10-13-81 order.
(V)10-08-81	Letter dated 10/05/81 from counsel for respondent to withdraw appearance of Nancy Long, Atty-at-Law
(V)10-08-81	4—Brief of the United States on the issue of attorneys' fees for losing parties under 42 U.S.C. 7607(f) (m-5)

Date	Filings—Proceedings
(G)10-13-81	Per Curiam order sua sponte, that petitioners Sierra Club and EDF are granted leave to amend their petitions for attorneys' fees and to file said amended petitions on or before October 19, 1981, and that respondent is granted an extension of time to and including October 26, 1981, within which to respond to the amended petitions for attorneys' fees; Robb, Wald and Ginsburg; CJs
(G)10-13-81	Per Curiam order sua sponte, that the order entered herein on October 5, 1981, concerning the motions for attorneys' fees, be and it is hereby vacated; Robb, Wald, and Ginsburg, CJs
(G)10-13-81	4—Respondent's motion to extend time to respond to Sierra Club's and EDF's motions for awards of attorneys fees (m-26) filed per above order
(G)10-13-81	4—Petitioner's (EDF) response to respondent's motions for leave to file out of time motion for enlargement of time to respond to motions for award of attorneys' fees (m-22) filed per above order
(G)10-13-81	4—Respondent's reply to oppositions of Sierra Club and EDF to motions for leave to file out of time and enlargement of time to respond to motions for award of attorneys' fees (m-1) filed per above order
(V)10-13-81	Letter dated 10/13/81 from counsel for EDF for appearance of Bingham Kennedy and Barry J. Trilling, Esq.
(V)10-13-81	4—EDF's consent motion to extend time to file reply memorandum to brief of the United States on the issue of attorneys' fees until 11/06/81 (m-13)
(V)10-15-81	4—Petitioner's amended request for attorneys' fees (m-13)
(V)10-22-81	4—EDF's consent motion to extend time to amend petition for attorneys' fees until 11/06/81 (m-21)
(B)11-02-81	4—Response for the United States to the Sierra Club's amended request for attorneys' fees (m-28)

Date	Filings—Proceedings
(B)11-03-81	Per Curiam order that petitioner's (EDF) motion for enlargement of time within which to amend its motion for attorney's fees is granted and petitioners (EDF and Sierra Club) are granted an extension of time, to and including 11-6-81, within which to file their amended petitions for attorney's fees; and that respondents are directed to file a response specifically directed to such amended petitions for attorney's fees, on or before 11-20-81. No further extensions of time will be permitted for either side, absent showing of extraordinary cause; Robb, Wald and Ginsburg, CJ's
(V)11-03-81	4—EDF's consent motion to extend time to file and serve documents to 11/13/81 (m-3)
**(T)11-02-81	4—Respondent's motion to bifurcate the issue of attorneys' fees (m-28)
(T)11-05-81	4—EDF's opposition to motion to bifurcate the issue of attorneys' fees (m-5)
(V)11-09-81	4—Petitioner's response to brief for United States on the issue of attorneys' fees and motion to bifurcate decision (m-5)
(V)11-16-81	4—Sierra Club's response to the United States to amend request for attorneys' fees (m-12)
(B)11-20-81	Clerk's order granting EDF's motion for enlargement of time to file and serve documents to 11-13-81
(B)11-20-81	4—EDF's amended motion for an award of attorneys' fees (m-13)—filed per above order
(G)11-20-81	4—Motion of US for leave to file motion to extend time to file brief on attorneys' fees (m-20)
(C)12-07-81	Per Curiam that granting respondent's motion for leave to file motion to extend time to file brief on attorneys' fees and costs and the Clerk shall file and docket respondent's motion for extension of time and respondent's motion for extension of time within which to file its brief is granted to and including December 7, 1981; Robb, Wald & Ginsburg, CJs
(C)12-07-81	4—Respondent's motion to extend time to file brief on attorneys' fees—granted
(C)12-07-81	4—Reply brief for the United States on the issue of attorneys' fees for losing parties under 42 USC 7607(F) (m-4)
(V)12-10-81	4—Sierra Club's opposition to motion to set date for filing brief on size of attorney fee award (m-7)

Date	Filings—Proceedings
(V)12-10-81	4—EDF's response to December 4, 1981 reply brief of respondent (m-4)
(V)12-14-81	4—EDF's opposition to respondent's motion to set date for the filing of the government's brief on the size of any attorneys' fee award (m-11)
(C)01-08-82	4—EDF's motion for leave to file opposition in reply to respondent's memorandum on the proper size of attorneys' fee award, time having expired (m-8)
(V)01-18-82	4—Petitioner's motion for permission to file out of time response to memorandum for the US on the proper size of an attorney fee award to a losing litigant (m-12)
(R)2-5-82	Opinion Per Curiam and Order granting leave to file documents and directing award of fees
(C)05-05-82	4—Report of petitioner EDF concerning settlement negotiations (m-5)
(C)05-07-82	4—EPA's status report (m-5)
(C)05-10-82	4—Sierra Club's report to the Court and second amended request for attorneys' fees (m-5)
(C)05-17-82	4—Motion of EDF to amend and supplement its application for attorneys' fees and amended application therefore (m-17)
(V)05-20-82	Per Curiam order, sua sponte, that respondent may file, at her option, a single response to the various pending requests by petitioners for attorneys' fees and expenses; and sua sponte, that respondent's response or responses shall be filed on or before May 27, 1982. Extensions of time will only be granted on showing of extraordinary cause; Robb, Wald and Ginsburg, CJs
(B)05-27-82	4—Respondent's response to Sierra Club's and EDF's status reports and amended requests for attorneys fees (m-27)
(C)06-07-82	4—United States' response to Sierra Club's and EDF's status reports and amended requests for attorneys fees (m-27) CORRECTED RESPONSE
(C)06-07-82	4—Sierra Club's reply to United States' response to amended fees request (m-4)
(C)06-09-82	4—Petitioner's reply to respondent's response to amended fees request (m-9)
(V)06-22-82	Per Curiam order that petitioner's motion to amend and supplement its application for attorneys' fees is granted; Wald and Ginsburg, CJs and SCJ Robb
(S)07-16-82	Opinion per curiam
(S)07-16-82	Fees are awarded in accordance with the opinion filed

Date	Filings—Proceedings
(S)07-16-82	Standard order on mandate
(S)07-16-82	Per Curiam order that the opinion is amended
(C)07-20-82	4—Letter from counsel for EPA advising of additional authorities pursuant to FRAP 28(j) (m-20)
(B)07-22-82	4—United States' motion for stay of mandate (m-22)
(V)08-13-82	Per Curiam order that respondent's motion for stay of mandate is granted and the Clerk is directed not to issue the mandate herein for a period of thirty (30) days from the date of this order; SCJ Robb, Wald and Ginsburg, CJs
(C)08-18-82	Notice from Clerk, SC that petition for writ of certiorari was filed in SC No. 82-242 on Aug. 11, 1982
(T)10-19-82	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-242 on 10-18-82

EXCERPTS FROM CALENDAR OF DAVID G. HAWKINS, ASSISTANT ADMINISTRATOR, EPA, for April 30, 1979 and May 1, 1979*

Monday, April 30, 1979:

10 a.m.:	WHITE HOUSE MEETING ON NSPS

*****

2:30 p.m.:	MESSRS. FRED KAHN, WALT BARBER, FRANK PRINCIOTTA & MS. BANKOFF RE: DRY SCRUBBING 200 OEOB

Tuesday, May 1, 1979:

10:00 a.m.:	MESSRS. PHIL CUMMINGS WALT BARBER RE: NSPS 4204 DIRKSEN

*Included in Environmental Defense Fund's Appendix of Lodged Documents, filed September 5, 1980, at A-5

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed April 11, 1980

No. 79-1565
79-1874

SIERRA CLUB, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

AND CONSOLIDATED CASES

ENVIRONMENTAL DEFENSE FUND MOTION FOR LEAVE TO OBTAIN DISCOVERY FROM RESPONDENT EPA

Pursuant to Federal Rule of Appellate Procedure 27(a) and on the grounds set forth in the attached memorandum, the Environmental Defense Fund (EDF) moves for leave to take depositions of the following key respondent (EPA) officials or, in the alternative, for leave to serve interrogatories on these officials:

Douglas M. Costle, Administrator
Barbara Blum, Deputy Administrator
David Hawkins, Assistant Administrator for Air and Waste Management
Charles Warren, Regional Administrator for Region II, formerly Director, Office of Legislation
Walter Barber, Director, Office of Air Quality Planning and Standards

The inquiries will be limited to (1) the identity of participants in post-comment period conversations and meetings with private parties, members of Congress, and senior officials of other government agencies and offices; and (2) simple narrative descriptions of the conversations and meetings, particularly by non-EPA participants.

The requested discovery is necessary to inform the court of the substance of post public comment period communications with EPA by interested parties opposed to the new source performance standards (NSPS) alternatives originally favored by the EPA. These communications included calls, letters and meetings. Subsequent to these *ex parte* communications, NSPS were promulgated which are less stringent than the three alternatives favored within EPA shortly after close of the public comment period. In its June 29, 1979, petition to EPA for reconsideration of the NSPS, EDF requested that a detailed summary of each meeting be prepared and included in the docket as part of the record for review. The EPA Decision in Response to Petitions for Reconsideration states that "Agency officials wrote memoranda of all significant oral communications between Agency officials and persons outside the executive branch." 45 Fed. Reg. 8210, 8214. This is not correct. Furthermore, it is not for EPA to determine which *ex parte* communications after close of the public comment period are "significant" and, therefore, subject to disclosure to the public and to this court. EPA has not prepared summaries of meetings held on March 14, 1979 (participants: EPA, DOI, CEQ, DOE, White House), and March 28, 1979 (participants: Eastern coal state Senators, White House, Costle, numerous other parties). The EPA meeting summaries which do exist are not adequate. Attachments* A, B, C and D to this motion are EPA summaries of meeting held April 23, April 27, April 30 and May 2, 1979. It is apparent that the sketchy EPA summaries do not disclose the comments of the non-EPA participants. (See especially Attachment D, a forty-nine word summary of a meeting with at least twelve participants.)

The information sought by this discovery will aid the court in its determination of the validity of the challenged standards. The inquiries will be limited to factual accounts of what was communicated, particularly by the non-EPA

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*Each Attachment is part of the Record for Review: Attachment A—IV-E-13; Attachment B—IV-E-15; Attachment C—Attached to back of IV-E-24; Attachment D—IV-E-24.

participants, and will avoid prying into the mental processes of EPA decision-makers.

Respectfully requested,

/s/ ROBERT J. RAUCH
Staff Attorney

/s/ LARRY MARTIN CORCORAN
Staff Attorney

ATTACHMENT C

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

Office of
Air, Noise, and Radiation

April 30, 1979

SUBJECT: Meeting on Coal-Fired Power Plants on April 30, 1979
Attendees: Fred Kahn, George Eads, Si Lazarus, Walt Barber, Al Alm, Frank Princiotta, Barbara Bankoff, Bob Statnick and other White House staff

FROM: David G. Hawkins, Assistant Administrator for Air, Noise, and Radiation (ANR-443)

TO: The Files

The purpose of this meeting was to provide a technical briefing on the so-called dry scrubbing technology, to describe the state-of-the-art, future expected performance levels, utility orders, etc.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1565

SIERRA CLUB, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT
AND CONSOLIDATED CASES

MEMORANDUM IN SUPPORT OF EDF MOTION FOR LEAVE TO OBTAIN DISCOVERY FROM RESPONDENT EPA

The Environmental Defense Fund (EDF) moves for leave to take depositions from or, in the alternative, to serve interrogatories on five (5) key EPA officials.[1] After the January 15, 1979, close of the public comment period for the new source performance standards (NSPS), these officials participated in no fewer than six (6) meetings with private parties, members of Congress, and senior government officials, who advocated strongly against adoption of the more stringent new source performance standards for steam electric generating units to which the respondent EPA had at that time restricted its consideration. The EPA also received letters and telephone calls from the same interested parties. There is a substantial likelihood that these communications significantly changed the NSPS.

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[1] Douglas M. Costle, Administrator; Barbara Blum, Deputy Administrator; David Hawkins, Assistant Administrator for Air and Waste Management; Charles Warren, Regional Administrator for Region II, formerly Director, Office of Legislation; and Walter Barber, Director, Office of Air Quality Planning and Standards.

I. *Need for Discovery*

On September 19, 1978, proposed new source performance standards (NSPS) were published (43 Fed. Reg. 42154). Public comments were requested by December 15, 1978. Public hearings were held December 12 and 13, the record of which was held open until January 15, 1979. The final NSPS were published June 11, 1979 (44 Fed. Reg. 33580). After closing of the record on January 15, 1979, EPA received and entered in the record scores of comments. Telephone comments were also received. In addition, senior EPA officials are known to have participated in at least the following six (6) meetings:

Meeting Date	*Participants*[2]
March 14, 1979	EPA, DOI, CEQ, DOE, White House
March 28, 1979	Senators, White House, Costle, numerous other parties
April 23, 1979	National Coal Association, and Senator Byrd
April 27, 1979	DOE, OMB, EPA (dry scrubbing technical briefing)
April 30, 1979	White House (President), Hawkins, Barber, Costle
May 2, 1979	National Coal Association, EPA, DOE, Senator Byrd, other congressmen

Prior to these meetings, the EPA had reduced the some 15 alternative standards under review to three (3):[3]

- full scrubbing: 90% removal (annual average), 0.55 lbs. SO_2/million BTU emission ceiling;
- partial scrubbing: 33% minimum removal (annual average), 0.55 lbs. SO_2/million BTU emission ceiling; and
- regional standard: full scrubbing in the West (11 states), partial scrubbing elsewhere.

Subsequent to these meetings EPA promulgated a standard with a ceiling of 1.2 lbs. SO_2/million BTU. As the

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[2] To the best of our knowledge.

[3] March 9, 1979, EPA memorandum from David W. Tundermann to Bill Drayton through Roy Gamse, subject: NSPS Update.

court is aware, it is the contention of the Sierra Club and EDF that there is a substantial likelihood that the advocacy of interested parties at the above-listed meetings significantly changed the standards. *Cf.* §307(d)(8) of the Clean Air Act, 42 U.S.C. §7607(d)(8) ("the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made."). It is apparent that in order for the court to review and decide this controversy, it must know what happened during these private, undocumented or poorly documented, conversations and meetings. *See e.g., U.S. Lines v. Federal Maritime Commission*, 189 U.S. App. D.C. 361, 375, 584 F.2d 519, 533 (1978). *Cf. Home Box Office, Inc. v. FCC*, 185 U.S. App. D.C. 142, 190, 567 F.2d 9, 57 (1977) ("If *ex parte* contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon.") The court can know those happenings only through the requested discovery.

II. *Court Has Authority to Order the Requested Discovery*

> "A reviewing court has inherent power to obtain evidence needed to enable it to decide a contention of this sort [that is that] because of procedural irregularity, [the decision maker's] determination was a nullity." *National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1144 (2d Cir. 1974), *cert. denied*, 419 U.S. 874, 95 S.Ct. 135 (1974).

In *National Nutritional Foods Association*, the Court of Appeals held that it could order the taking of depositions of the decision maker by a party challenging promulgated rules. The court's holding has never been challenged. Indeed, in remanding *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 82[illegible] (1971), the Supreme Court stated that, "The Court may require administrative officials who participated in the decision to give testimony explaining their action." See *Home Box Of-*

fice, Inc. v. FCC, 185 U.S. App. D.C. at 185, 567 F.2d at 52 (court *sua sponte* ordered the Commission to provide "a list of all of the *ex parte* presentations, together with the details of each, made to it, or to any of its members or representatives, during the rulemaking proceedings.")

III. *The "Mental Processes Rule" is Inapplicable*

The requested discovery will be limited to the discussions which occurred in post-comment period meetings. Petitioner is simply seeking to establish, as precisely as possible, what was said at these meetings. No inquiry into mental processes of the decision-maker will be made. Therefore, the restrictions of the "mental processes rule" of *Morgan IV*[4] are inapplicable.

Assuming, *arguendo*, that the requested discovery were an inquiry into the mental processes of the decision maker, the "mental processes rule" is still inapplicable. *Morgan IV* was decided at the final stage of litigation "after all claims of procedural and constitutional irregularity had been put to rest...." *Singer Sewing Machine Co. v. NLRB*, 329 F.2d 200, 207 (4th Cir. 1964). "In an earlier stage of the litigation, *Morgan v. United States*, 304 U.S. 1, 58 S.Ct. 773, 82 L. Ed. 1129 (1938), when there had been more than a colorable claim of procedural irregularity, examination of the Secretary, and the receipt of other evidence, to determine if there had been a denial of a constitutional right was relied on in support of the conclusion that the hearing was fatally defective." *Id.*

> "[T]he mental process rule is but 'one facet of the general presumptions of regularity' which attaches to decisions of administrative bodies. Thus, we conclude, where a prima facie case of misconduct is shown, justice requires that the mental process rule be held inapplicable." (Citations omitted.) *Id.* at 208. See *Hercules, Inc. v. EPA*, ___ U.S. App. D.C. ___, 598 F.2d 91, 123 (1978). *See also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 420, 91 S.Ct. at 825.

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[4] *United States* v. *Morgan*, 313 U.S. 409, 421-22, 61 S.Ct. 999, 1004 (1941).

As already stated, *ex parte* conversations, comments, and no fewer than six (6) meetings occurred after close of the NSPS record. These communications violated the restrictions on *ex parte* communications generally, *National Small Shipments, etc.* v. *ICC*, 191 U.S. App. D.C. 214, 220, 590 F.2d 345. 351 (1978) ("the statutory requirement of a hearing [excludes] ... recourse to *ex parte* communications."), *U.S. Lines* v. *Federal Maritime Commission*, 189 U.S. App. D.C. 361, 375-76, 584 F.2d 519, 533-34 (1978), and restrictions on congressional interference specifically, *Koniag, Inc., Village of Uyak* v. *Andrus*, 188 U.S. App. D.C. 338, 347, 580 F.2d 601, 610 (1978), *cert. denied*, 439 U.S. 1052, 99 S.Ct. 733 (1979) (letter from Congressman to Secretary two days before reversal of a decision "compromised the appearance of the Secretary's impartiality," even though it did not name any particular claimants); *American Public Gas Assn'* v. *FPC*, 186 U.S. App. D.C. 23, 78, 567 F.2d 1016, 1069 (1977), *cert. denied*, 435 U.S. 907, 98 S.Ct. 1456-57 (1978) (whether proceeding is a judicial or a legislative function, "Congressional intervention which occurs during the still-pending decisional process of an agency endangers, and may undermine, the integrity of the ensuing decision, which Congress has required be made by an impartial agency charged with responsibility for resolving controversies within its jurisdiction."). Prior to these communications, the respondent (EPA) had reduced the alternatives being considered to three,[5] all more stringent than the standard finally promulgated after these *ex parte* communications. Even if the requested discovery were an inquiry into mental processes, these facts[6] are a sufficiently strong showing of improper behavior to overcome the "presumption of regularity" which prevents inquiry into decision-maker mental processes.

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[5] *See* note 3, *supra*.

[6] *See also* 44 Fed. Reg. 33595-96 (As a result of the April 5, 1979 meeting between EPA and National Coal Association representatives, "the Administrator revised his assessment of state-of-the-art coal cleaning.").

CONCLUSION

EPA officials participated in a number of *ex parte* conversations and meetings after the close of the NSPS record. The final promulgated NSPS was not among the three alternative standards under review before the meetings and was less stringent. The three alternative standards under review before the meetings were opposed by the interested parties at the meetings. This court has inherent authority to obtain evidence of the conversations and meetings. The taking of depositions by petitioner is an approved method of obtaining the necessary evidence. The requested discovery is not an inquiry into "mental processes" but, even if it is, it is permissible because of the strong showing of improper behavior by the respondent.

For these reasons, petitioner is asking this court for leave to take depositions of senior EPA officials who have knowledge of the post-comment period conversations and meetings.

Respectfully submitted,

/s/ ROBERT J. RAUCH
Staff Attorney
/s/ LARRY MARTIN CORCORAN
Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1979

No. 79-1565

SIERRA CLUB, PETITIONER,

v.

DOUGLAS M. COSTLE, ADMINISTRATOR
OF THE ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT.

NATIONAL COAL ASSOCIATION
ALABAMA POWER COMPANY, ET AL., INTERVENORS.

AND CONSOLIDATED CASES

BEFORE: McGOWAN*, MIKVA and EDWARDS; *Circuit Judges*

ORDER

Upon consideration of the petitioner's motion for leave to obtain discovery, the opposition and replies thereto, and the entire record in this case, it is

ORDERED by the Court that the aforesaid motion is referred to the division of this Court to be drawn to hear this case on the merits.

The parties in their briefs should address the petitioner's entitlement to the information requested, and the petitioner's need for the information requested in order to prosecute its case fully.

IT IS FURTHER ORDERED by the Court that the respondent shall submit to the Court within five days of the date of this order an affidavit(s) providing information

*Circuit Judge McGowan did not participate in the foregoing order.

about the following meetings, identified here by date with reference to the petitioner's motion:

March 14, 1979; April 23, 1979; April 27, 1979; April 30, 1979; and May 2, 1979.

The affidavit(s) shall identify the participants in the foregoing meetings, and shall describe as fully and accurately as possible how the meetings came to be held and the approximate length of each.

IT IS FURTHER ORDERED by the Court that briefs in this case shall be submitted pursuant to the following schedule:

Petitioners' brief(s)—10 days after filing of respondent's affidavit

Respondent's brief—30 days after filing of petitioners' brief(s)

Intervenors' brief(s)—15 days after filing of respondent's brief

Reply brief(s)—12 days after filing of intervenors' brief(s)

Per Curiam

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Filed August 25, 1980

No. 79-1565 and
Consolidated Cases

SIERRA CLUB, ET AL., PETITIONERS

v.

DOUGLAS M. COSTLE, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

MOTION FOR LEAVE TO FILE AFFIDAVIT

Respondents hereby move for leave to file the attached affidavit of David G. Hawkins, EPA Assistant Administrator for Air, Noise and Radiation. The following grounds support the granting of this motion.

1. On April 11, 1980, petitioner Environmental Defense Fund (EDF) moved for leave to obtain discovery. One of EDF's main arguments was that meetings attended by EPA officials concerning the NSPS rulemaking were not adequately documented for the purposes of judicial review.

2. On June 16, 1980, this Court issued an order that EPA should submit affidavits providing specified information on meetings held on March 14, April 23, April 27, April 30, and May 2, 1979.

3. On June 24, June 25, and July 9, 1980, EPA filed affidavits providing the information specified by the Court's June 16 order.

4. EDF has objected in its opening brief that relevant meetings are still undocumented. EDF Br. at 44.

5. First, EDF objects that the EPA affidavits discuss only one Executive Branch meeting on April 30: a briefing on dry scrubbing (June 24 Hawkins affidavit, paragraph 4). EPA had assumed that it was this April 30 meeting that EDF wanted documented, since EDF referred to it in its discovery papers. EDF Motion for Leave to Obtain Discov-

ery from Respondent EPA at 3, n * and Attachment C. It appears that EDF meant to refer to the other April 30 meeting (or to both). The attached affidavit therefore provides the information specified by this Court's order of June 16 for the other April 30 meeting.

6. EDF also objects that a May 1, 1979 meeting is undocumented. Although this meeting was not covered by the Court's June 15 order, nor was it mentioned in EDF's discovery papers, the attached affidavit supplies the information that would be required if it were covered by the order.

Respectfully submitted,

/s/ CHARLOTTE URAM

Attorney, Pollution Control Section
U.S. Department ofJustice
Tenth and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

/s/ EARL SALO

Attorney, Air, Noise and Radiation Division
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed September 5, 1980

CITY OF WASHINGTON
SS:
DISTRICT OF COLUMBIA

AFFIDAVIT

David G. Hawkins declares as follows:

1. I am the Assistant Administrator for Air, Noise and Radiation of the Environmental Protection Agency. I supervised the development of the rule establishing new source performance standards for electric utility steam generating units, which was promulgated by the Administrator on June 11, 1979. 40 C.F.R. Part 60, Subpart Da; 44 Fed. Reg. 33580.

2. On April 30, 1979, EPA officials briefed the President and Executive Branch officials on the issues and options presented by the rulemaking. The briefing was held on EPA's initiative, as part of the Agency's policy of briefing the Executive Branch on major EPA actions. It lasted about one hour. It was attended by the following persons: President Carter; James Schlesinger, Secretary of Energy; Charles Schultze, Chairman of the Council of Economic Advisors; Charles Warren, Chairman of the Council on Environmental Quality; Alfred Kahn of the White House Staff; Stu Eizenstat, Advisor to the President for Domestic Policy; Kitty Schirmer and perhaps Simon Lazarus of the President's Domestic Policy Staff; Jim McIntyre and Elliot Cutler of the Office of Management and Budget; Douglas Costle, EPA Administrator; myself; and other employees of the offices of the above persons, whose names I do not recall.

3. On May 1, 1979, EPA officials briefed staff members of the Senate Committee on Environmental and Public Works on EPA's analysis of the effects of alternative emission ceilings on coal reserves. The briefing was held at

EPA's initiative, and was substantially the same as the briefing given to Senator Robert Byrd on May 2. The briefing lasted about one hour. It was attended by Phil Cummings, Committee Staff Director, perhaps by John Yago, Committee Chief Counsel and by other members of the Committee Staff whose names I do not recall, Walt Barber and John Haines of EPA's Office of Air Quality Planning and Standards, other EPA employees whose names I do not recall, and myself. No persons other than Committee Staff members and EPA officials attended the briefing. It was an oversight that I did not have a memorandum of this briefing prepared for the rulemaking docket.

/s/ DAVID G. HAWKINS
Assistant Administrator for
Air, Noise & Radiation

Executed on 8/14/80

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

June 11, 1981

Embargoed for Release
6:00 p.m. E.D.T.
June 13, 1981

M-81-9

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: DAVID A. STOCKMAN
DIRECTOR

SUBJECT: Certain Communications Pursuant to Executive Order 12291, "Federal Regulation"

Regulatory relief is one of the cornerstones of President Reagan's program of economic recovery. As an important step in achieving regulatory relief, on February 17, 1981, the President issued Executive Order 12291, "Federal Regulation." This memorandum explains how the Presidential Task Force on Regulatory Relief and the Office of Management and Budget (OMB) will communicate with the public and the agencies regarding proposed regulations covered by E.O. 12291. It also describes certain obligations of the public and agencies in this regard.

A major purpose of the Executive Order is to ensure that, to the extent permitted by law, regulatory decisions are based upon sound analysis of the potential consequences. Toward this end, a comprehensive factual basis is essential to assist agencies and other interested parties in assessing the economic and other ramifications of proposed regulations.

Under the Executive Order, both the Task Force and OMB will be reviewing factual materials related to regulatory proposals. Both the public and the agencies should understand that the primary forum for receiving factual com-

munications regarding proposed rules is the agency issuing the proposal, not the Task Force or OMB. Factual materials that are sent to the Task Force or OMB regarding proposed regulations should indicate that they have also been sent to the relevant agency. Pursuant to this policy, the Task Force and OMB will regularly advise those members of the public with whom they communicate that relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record. Accordingly, agencies receiving such materials from the public should take care to see that they are placed in the record.

On occasion, the Task Force staff and OMB will receive or develop factual material which they believe should be considered by an agency during a particular informal rulemaking. In accordance with advice provided by the Department of Justice, such material, when submitted to an agency for its consideration, will be identified as material appropriate for the whole record of the agency rulemaking.

Two additional matters should be noted. First, our procedures will be consistent with the holding of and policies discussed in *Sierra Club* v. *Costle*, No. 79-1565, slip op. at 212-20 (D.C. Cir. April 29, 1981). Second, these procedures apply only to informal rulemaking proceedings and are not in any sense intended to affect the more stringent ex parte rules applicable to agency adjudications and formal rulemakings. (Such proceedings are expressly intended by Congress to be more in the nature of formal judicial proceedings and involve bars against various forms of ex parte communication.)

Supreme Court of the United States

No. 82-242

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER,

v.

SIERRA CLUB, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 18, 1982.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.